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NOTES.

CRIMINAL CONSPIRACY TO VIOLATE THE MANN ACT.—The common law misdemeanor of conspiracy is defined as a confederation to effect an unlawful object by lawful means, or a lawful object by unlawful means.[1] The agreement is the gist of the offense, and it is unnecessary to show any acts done in pursuance thereof.[2] There is a substantial unanimity of opinion that an indictment will lie if the ultimate of-

[1] 2 Wharton, Criminal Law (11th ed.) § 1600.

[2] See People *v.* Mather (N. Y. 1830) 4 Wend. 229, 259; State *v.* Buchanan (Md. 1821) 5 Har. & J. 317, containing a valuable review of the earlier English decisions.

fense be criminally punishable, or if the means adopted be criminal, although the end contemplated is lawful. The courts have, however, gone further in an endeavor to protect the community from the potentiality for evil inherent in the concurrence of several minds for unlawful purposes, and it is generally said that an agreement to do a non-criminal act will be indictable if the end in view is of such a nature that combined numbers will have a necessarily greater power for harm.[3] This test is, however, from its very nature, vague in the extreme, and the existence of an indictable conspiracy to commit unlawful acts not included in the above-mentioned classes, comes down virtually to a question of the individual court's opinion upon the public policy of the issues involved. The distressing uncertainty resulting from this state of affairs, particularly in labor disputes,[4] is contrary to the whole basis of criminal jurisprudence, which requires that punishable offenses be reasonably definite in scope,[5] with the result that many States have enacted statutes limiting or defining the offense.[6] Some of these statutes require, in addition, the commission of some overt act for the completion of the crime.[7] This is true of the federal enactment against conspiracy, which reads as follows: "If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty . . ."[8]

The provisions of the statute punish agreements to defraud the United States in any manner,[9] as well as where the object contemplated is criminally punishable. The necessity of the commission of some overt act has been interpreted as giving the accused no more than a *locus poenitentiae,* since the unlawful agreement is still, as at common law, the gist of the offense.[10] Hence, the indictment need allege no more than the commission of some overt act by any one of the defendants,[11] and it is not necessary to allege how the act will

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[3]See 2 Bishop, Criminal Law (8th ed.) § 180. Thus agreements to defraud, Regina *v.* Warburton (1870) L. R. 1 C. C. R. 274; State *v.* Buchanan, *supra,* or to obstruct justice, Regina *v.* Hamp (1852) 6 Cox C. C. 167; State *v.* DeWitt (S. C. 1834) 2 Hill Law 282, or to extort money, Rex *v.* Kinnersly (1719) 1 Strange 193, or to injure the reputation of another, Rex *v.* Armstrong (1677) 1 Ventris 304; Rex *v.* Kinnersley (1760) 1 Wm. Black. 294, or to commit an immoral act, Regina *v.* Howell (1864) 4 F. & F. 160; Smith *v.* People (1860) 25 Ill. 1, are held indictable, irrespective of whether the ultimate offenses are substantive crimes.

[4]Compare State *v.* Donaldson (1867) 32 N. J. L. 151, with Commonwealth *v.* Hunt (Mass. 1842) 4 Metc. 111. See State *v.* Dalton (1908) 134 Mo. App. 517.

[5]See 2 Wharton, Criminal Law, § 1601.

[6]See N. Y. Penal Law, § 580.

[7]See 2 Bishop, Criminal Law (8th ed.) § 192; N. Y. Penal Law, § 583, which requires an overt act, unless the agreement is to commit a felony upon the person of another, or to commit arson or burglary.

[8]35 U. S. Stat. at L. 1096.

[9]See Curley *v.* United States (C. C. A. 1904) 130 Fed. 1.

[10]See Williamson *v.* United States (1907) 207 U. S. 425; United States *v.* Donau (C. C. 1873) 11 Blatchf. 168; but see Hyde *v.* United States (1912) 225 U. S. 347.

[11]Bannon *v.* United States (1895) 156 U. S. 464.

effectuate the object of the conspiracy.[12] Any overt act is admissible in evidence of the crime, although it is not set out in detail in the indictment, as in the recent case of *Houston* v. *United States* (C. C. A. 1914) 217 Fed. 852.

An interesting question arises when some one of the alleged conspirators is not punishable for the completed offense. The rule is established that a party who is incapable of committing the intended crime because of sex, age, position, or for other reasons, may nevertheless be convicted as principal in the second degree,[13] or as accessory,[14] a doctrine which has been carried over by analogy to the offense of conspiracy.[15] Because of the very danger inherent in a confederation, however, there may be an unlawful conspiracy where the ultimate crime is impossible of accomplishment,[16] and the state of facts, therefore, precludes the existence of an accessory to that crime. So where one party is not technically an accomplice, as for example, the woman in abortion cases, she may nevertheless conspire with others to commit an abortion upon herself.[17] It may, therefore, be generally stated that the inability of a person to commit the ultimate offense, either as a matter of fact or for reasons of law, does not preclude such person from being a party to a criminal conspiracy to commit that offense. There are, however, certain logical exceptions to this rule. In the first place, when the completed offense necessarily involves an unlawful agreement between two or more persons, and that offense is consummated, such persons cannot be convicted of a conspiracy to commit the offense,[18] since this would amount to a double conviction on the identical state of facts, and the rule against double jeopardy would be violated. But where there are parties to such a confederation other than those who have by agreement committed the substantive offense, there is an additional feature which makes the confederation different

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[12]United States *v.* Benson (C. C. A. 1895) 70 Fed. 591.

[13]The Trial of Mervin Lord Audley (1631) 3 Howell's State Trials 401; United States *v.* Snyder (1882) 14 Fed. 554.

[14]State *v.* Sprague (1856) 4 R. I. 257.

[15]United States *v.* Stevens (D. C. 1890) 44 Fed. 132; United States *v.* Martin (C. C. 1870) 4 Cliff. 156; Cohen *v.* United States (C. C. A. 1907) 157 Fed. 651; Regina *v.* Mears (1851) 4 Cox C. C. 423.

[16]See Regina *v.* Whitchurch (1890) L. R. 24 Q. B. Div. 420. In this case, a woman was held guilty of conspiring with others to procure an abortion on herself. Her co-conspirators were guilty of a statutory felony; but she, herself, could not, alone, be guilty of the intended offense, not being with child at the time.

[17]See Solander *v.* People (1873) 2 Colo. 48; State *v.* Crofford (1907) 133 Iowa 478.

[18]United States *v.* Dietrich (C. C. 1904) 126 Fed. 664; United States *v.* New York Central etc. Ry. (C. C. 1906) 146 Fed. 298. These cases cannot be based upon the doctrine that the conspiracy, being a misdemeanor, is merged in the subsequent felony, since that somewhat metaphysical theory has been repudiated in most of the States, Wait *v.* Commonwealth (1902) 113 Ky. 821; Commonwealth *v.* Stuart (1911) 207 Mass. 563, overruling Commonwealth *v.* Kingsbury (1809) 5 Mass. 106, and seems to be no longer law in the federal courts. See United States *v.* Gardner (C. C. 1890) 42 Fed. 829. The law in New York appears uncertain. See People *v.* Rathbun (N. Y. 1904) 44 Misc. 88.

on the facts from the ultimate crime, and a conviction for conspiracy will be sustained.[19]

The second exception includes a limited class of cases in which the parties are incapable of committing a conspiracy as a matter of law. Thus, since two parties are essential to a conspiracy, a husband and wife cannot be convicted for that offense where the common law doctrine of domestic unity prevails.[20] If, however, there is a third party to the agreement between the spouses, all may be liable.[21]

The final exception to the general rule is where there is a disability in fact, as where the nature of the ultimate offense negatives the inference that one or more of the defendants could have the *mens rea* necessary to a conspiracy for the commission of such offense. Thus, a trustee in bankruptcy cannot conspire with others to dispose of the bankrupt's property for the purpose of defrauding the trustee;[22] nor, it is submitted, can the injured woman be held for a conspiracy for her own seduction. This theory was recently urged in *Holte* v. *United States* (U. S. Sup. Ct. 1915) 35 Sup. Ct. Rep. 271, in which the female defendant, and a man, were indicted for conspiring that he should transport her in interstate commerce for immoral purposes, contrary to the penal provision of the federal statute known as the Mann White Slave Act.[23] Both defendants were nevertheless convicted, since the Mann Act distinctly provides that criminal liability shall attach whether the person transported goes willingly or unwillingly.[24] The court clearly held correctly, since the words "with her consent" permit the presence of a *mens rea* in the woman necessary to the existence of the conspiracy, and, as we have pointed out, it is immaterial whether or not she could have been held as a technical accomplice. The decision should have the necessary effect of doing away with the not infrequent attempts at blackmail which have resulted from the passage of the Act, and the supposed immunity afforded thereunder to the "victim", and the case is, therefore, in consonance with sound public policy as well as a logical application of existing law.

WAIVER OF PRIVILEGE AGAINST SELF-CRIMINATION.—The privilege of a witness against self-crimination, being personal, cannot be asserted for him or taken advantage of by a third party,[1] and may be freely waived. Since an ordinary witness can be compelled to testify, he never waives his privilege by simply taking the stand,[2] but does so by answering the criminating question.[3] When the accused, on the

[19]Thomas *v.* United States (C. C. A. 1907) 156 Fed. 897; see Chadwick *v.* United States (C. C. A. 1905) 141 Fed. 225; United States *v.* Shevlin (D. C. 1913) 212 Fed. 343.

[20]People *v.* Miller (1889) 82 Cal. 107.

[21]See Kirtley *v.* Deck (Va. 1811) 2 Munf. 10.

[22]Johnson *v.* United States (C. C. A. 1907) 158 Fed. 69.

[23]36 U. S. Stat. at L. 825, c. 395. The act has been held constitutional, as a valid exercise of the federal police power. Hoke *v.* United States (1913) 227 U. S. 308; see 14 Columbia Law Rev., 429, 431.

[24]In 36 U. S. Stat. at L., at p. 826, occur the words "whether with or without her consent."

[1]Morgan *v.* Halberstadt (C. C. A. 1894) 60 Fed. 592.

[2]State *v.* Bond (1906) 12 Idaho 424, 433-435.

[3]See State *v.* Lloyd (1913) 152 Wis. 24.